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AUTHOR Voegel, George
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ABSTRACT

The concept of intellectual property rights (defined as the creative work of some unknown dimension) is put into the perspectives in this speech of the individual involved, the educational institution, and the general public. Such concerns are ethical implications, incentives, costs, quality, change and innovation, impact on lifelong learning programs, and the impact of education, research, and service. Consideration is given to ownership prototypes, and ethical conflicts of interest such as reprint/copying request procedures and consulting on one's own time. Educational challenges in this area of intellectual property rights touch on areas of governance, institutional autonomy, faculty workload, productivity, and negotiations. Suggestions are offered for incorporating solutions to these problems into appropriate institutional policy. Included is an "Ownership of Intellectual Property Development Checklist." With the impending implementation of a new copyright law, says the author, it is imperative that colleges and universities examine their own policies and take appropriate action. (LBH)

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Ethical and Economic Issues:

Intellectual Property, Who Owns it?

by

George Voegel

U S DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

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"Ethical and Economic Issues - University Policies for
Consulting, Overload Instructional Activities and Intellectual Property"

ETHICAL AND ECONOMIC ISSUES:
INTELLECTUAL PROPERTY, WHO OWNS IT?

George Voegel
Harper College
Palatine, IL.

INTRODUCTION

Within the context of the theme topic of this conference I have been given the somewhat difficult task of putting the concept of intellectual property rights (operationally defined as a creative works of some unknown dimensionality and Euclidian in character) into the perspectives of the individual involved, the educational institution, and society (the general public). Such concerns are ethical implications, incentives, costs, quality, change and innovation, impact on lifelong learning programs, and the impact on education-research-service. My remarks will be made from the college/university point of view and will not specifically touch upon associations, statewide organizations, and so forth.

I. OWNERSHIP PROTOTYPES

I believe it is worthwhile to examine several existing or emerging so called ownership prototypes. I have restrained myself from calling them models because I think higher education today is over-saturated with models, and the literature abounds with models is turning off the educational practitioners who have to deal in operational policies and procedures. For the sake of discussion in this conference, the following prototypes (sterotypes?) are offered as

a way to conceptualize this facet of concern about intellectual property:

Individual Entrepreneur
(Lais 'sez Faire')

Stock Holders - "Shares"

Discount Center - "%"

Technological Support

Industrial - "Hired Hand"

Taxpayer's/People's

The individual entrepreneur is typified as the proverbial basement tinker, the Thomas Edison's, the "unemployed" novelist or composer, or the faculty member with his/her own consulting firm. Typically this type feels no allegiance to any organization and in academia probably feels they are doing the university a favor by letting it provide them with a rent free office, telephone, duplicating service, and faculty privileges to the library. They would never give it a second thought that perhaps with various levels of assistance given to them, that they have "bought a partner" somewhere along the way. In academia this type may fast become an endangered species.

The stockholder setting may be described as a partnership where the institution and the individual mutually agree to "share" any income. Often, under conditions where there is no institutional policy or procedure this "sharing" has been hammered out in the heat of controversy and blurred over by governance issues.

The Discount Center approach gets its title from the discount stores which always seem to offer something at "--% off". Income derived from this is proportioned out between the institution and individuals involved. Often, the terms of such agreements will "discount" or "mark down" developmental costs usually spent by the institution, and after these are paid back, then each party receives a percentage.

The technological support approach begins to tilt the balance in favor of the institution and is a rather recent development precipitated by the advent of costly television and computer services on campus. More and more colleges and universities are saying that faculty and other staff have really "bought a partner". When the use of these kinds of services are involved to the extent that outside agencies funds such as State and Federal Grants are used, the situation has become more complex. It remains to be seen how far this will go in extending into policy and procedure determination. For example, with the recent growth of computerized reference/ bibliographic services, has the university professor bought a partner if he or she leans too heavy on library research or reference service? And what of the support service staff, have they also become partners to share in any profits/income from the project in question?

The industrial setting where the employees have been traditionally viewed as a "hired hand" and get a mere $100 for their creative efforts while the company takes all, is very well known. There seems to be a trend toward this kind of conceptualization, especially as more agencies beyond the institution get involved.

It should be noted at this point that all that has been very briefly outlined could be discussed as a policy development continuum between the soft touch/ give away and the hardline approaches.

Ownership Continuum

Individual ———— Industrial

Most policy/procedure agreements developed in regard to ownership to intellectual property have been argued out somewhere within this range.

Now comes a new element, a new type, the taxpayer, the PEOPLE, the consumer (student?) and various other advocates beginning to pressure educational institutions to reshape their procedures to take into account who is helping to foot the bill (costs). The results are far from in. Does a State university, funded by State revenues (taxes, etc.) now have an obligation to return some revenues generated by its employees to its "investors" - the taxpayers? Or does the consumer/student get a piece of the action in the form of reduced tuition or fees, or increased scholarship funds? Should funding agencies at least get their

initial investment (grant) cost back before the institution and individual do their sharing, discounting or other procedures? Is it reasonable to assume that an aroused society (general public-the people) is calling for an increased role in policy planning and determination of ownership in intellectual property?

II. ETHICS/VALUES - CONFLICT OF INTEREST

This dimension of intellectual property perspectives is concerned with some of the value judgments currently being espoused in controversies over ownership, and obviously the list could be much more definitive, however for the purposes of discussion of this conference, I have listed the following value aspects:

Thou shall not steal
Creator values
Done on Own Time Ethic
Bill Payer "rights"

One of the oldest ethical values of all - "Thou shall not steal" is soon to have a new dimension for intellectual property in the form of the new Copyright Law, effective January 1, 1978. For the first time, not only are many of the conditions for copying spelled out, but also the consequences of stealing (illegal copying another's works). Other forms of this ancient "stealing" law can be illustrated in the academic area by "Honor Codes", plagiarism codes, reprint/copying request procedures for articles, and more recently by

the installation of electronic book security systems in libraries, electronic sensors on doors monitoring off-hour entry to various buildings, TV camera monitoring of vending machine areas, and legal battles about video/taping off the air. Is there a difference between stealing and "rip-offs" in such situations as universities' facilities and services as a base for private consulting practices, unproductive release time for projects, or the use of the talents of supportive staff without sharing the income, or are these just a matter of degree?

Creator values are those defense rationales developed by individuals to justify their sole ownership of their intellectual property. While largely covered under copyright, trade mark, patent procedures and statutes, these individuals (perhaps rightly so under conditions of weak or non-existent institution policies) "cry wolf" at even the slightest hint or suggestion of institutional partnership. On the other hand, there are still those creators whose value systems have lead them to the decision to turn over their revenues for worthwhile institutional projects. These benevolent types may also be an endangered species.

The "done on own time" types are the ones that are adament that their intellectual property creations are solely their own business because the "creations" were done on their time. As a group, they are the ones

causing a tightening of policies and procedures for all. Typically, they are the ones who arrange their class schedules so that they have off two or three days a week to do their consulting. Their perspective or values on this are probably rationalized under Service, but the majority of educators would not think so. This group is also most likely to be caught in the arena of conflict of interest since they are in effect serving many masters. This is not to say those who made important contributions on their own time are not deserving but rather for this discussion they should be considered in with the creators.

The bill payer approach takes the point of view that whoever pays the bill (costs) should have rights in revenues generated from development and sale of intellectual property. There is much value concern under this concept since different agencies (institution, State, Federal, etc.) and groups (tax payers, legislators, consumer/students) are vieing for a piece of the action. Another group in this arena are the various state and federal agencies which have in their grant/funding procedures clauses which provide for funded projects to be put in the "public domain". The obvious implication of this value approach is that while making "it" available to all, it leaves little if any monetary incentive for marketing and distributing "it" because of lack of ownership controls. There has now begun serious discussion of this

at various agency levels to see if some modification can be done.

The conflict and clash between the values of these groups will only serve to further erode some of traditional practices of the past.

III. EDUCATIONAL CHALLENGES

Within this area of intellectual property perspectives (see figure 1) are the institutional "combat zones" of:

Costs
Incentives
Quality
Change and Innovation
Life-long learning
Education-Research-Service

These variables present all of us with managerial challenges of planning, and policy/procedure formulation to attend to the internal and external forces changing post-secondary education today. Governance, institutional autonomy, faculty workloads, productivity, and negotiations are just a few examples of the ethical and economic issues challenging us today.

Cost and quality go hand in hand in all other facets or variables of these educational challenges. Costs in regard to intellectual property probably fall within three general categories. First would be total developmental costs which is an accountant's delight (or nightmare) to consider all the related costs. Second is less obvious but regularly practiced, in that release time, or reduction in load is applied to complete a creative project. The third category is a reasonable cost estimate for facilities use and/or support service charges. It should also be

obvious that quality costs money too. Quality control is usually set in the project mission and goal statements about evaluating outcomes or under what condition success or failure occur. Research projects may take years and only prove to be of theoretical value, while service projects might see results in six months. New products (course materials, AV equipment, etc.) resulting from successful outcomes in teaching projects are continually being marketed. However as many of you know, the quality controls are not always of the highest level in some of these projects.

The incentives are not only linked with costs but generally institutional tools with which to precipitate change and innovation in education. Whether institutional mini-grants for improvement of teaching, innovative travel funds, professional expense funds, release time, assignment of graduate or teaching assistants, additional clerical help, faculty/staff development programs, and so on, are viewed as incentives, costs, or institutional change and innovative elements is not a major concern here. What is of concern here and in the entire intellectual property perspectives is that educational institutions and their individual staff members spend the planning time to develop effective and comprehensive policies and procedures related to the intellectual property issues, otherwise there will be little renewal energies left to meet new challenge of lifelong learning.

The question of ownership of intellectual property, individual versus institutional and now other agencies

and the "people" is the subject of much discussion. Many colleges have attempted to formalize, in policy or procedures, the various elements involved in these ownership relationships, some have tended to encourage faculty innovation especially as related to improving the teaching/learning process for the students, while other institutional policies have tended to emerge as conservative and protective (the industrial prototype?) In its simplest form, the question to be resolved is "Who Owns What, When, and Where and Under What Conditions?"

For anyone attempting to respond to this in the development of policy, an excellent resource (see - Intellectual Property Ownership Policy Development Appendix) is "Copyrights at Colleges and Universities" published by NACUBO. The basic policy concerns are briefly discussed and would need to be developed into appropriate institutional policy. For those who want an example of how such a contemporary ownership was evolved into policy, look up the article in the Appendix entitled "Copyright and Ownership of College-Developed Materials". Somewhat of a check list on policy development questions is worth noting here:

Ownership of Intellectual Property
Policy Development Checklist

Under what conditions has the individual "bought" himself a partner (the institution, state/federal agency, foundation, etc.)?

What are the limits of such a partnership?

How long will this condition exist?

Will the policy include patents and inventions, or will these be dealt with separately?

How flexible are state and national laws regarding copyrights?

What types of individuals or entities are covered or included in such a policy?

What terms or phrases need definitions?

Do procedures need to be developed separately from policy?

Do levels of college support need to be explained or defined?

Should the policy differentiate between "equity in" and "ownership of"?

Is the recovery of development costs important before any sharing of income?

Does the way the institution uses its share of any income need to be specified or can it use these funds as it sees fit?

What policy review procedures need to be included?

What materials are subject to such a policy?

What consideration will be given to internal and external use and revision or deletion of materials?

What will be the institutional limits on copyright and ownership in regard to consortia or other cooperative arrangements?

What procedures should be defined for obtaining clearance and permission to use others' materials and/or their appearances in institutionally produced materials?

Under what conditions should the individuals or the institution investigate alleged violations of copyright and who assumes the potential legal costs?

What protections will be needed for the various support services and their personnel?

Should a permanent institutional committee be established to act as a review committee on matters relating to ownership?

Also in the Appendix is a brief listing of some colleges and universities which have implemented ownership policies, however a new survey of institutional policies needs to be done.

CONCLUDING COMMENTS

There are no easy solutions to the ownership question and days of singular or unilateral decisions are over. Faculty and staff, as well as external agencies are calling for a tightening up of policies to spell out to all concerned "Who Owns What, When, and Where and Under What Conditions? As external organizations and interest groups continue to raise concerns over possible "Conflict of Interest" and consulting work, more institutional energy needs to be put into the development of an ownership policy. Finally, with the impending implementation of a new Copyright Law, it is imperative that the colleges and universities examine their own policies and take appropriate action.

INTELLECTUAL PROPERTY PERSPECTIVES

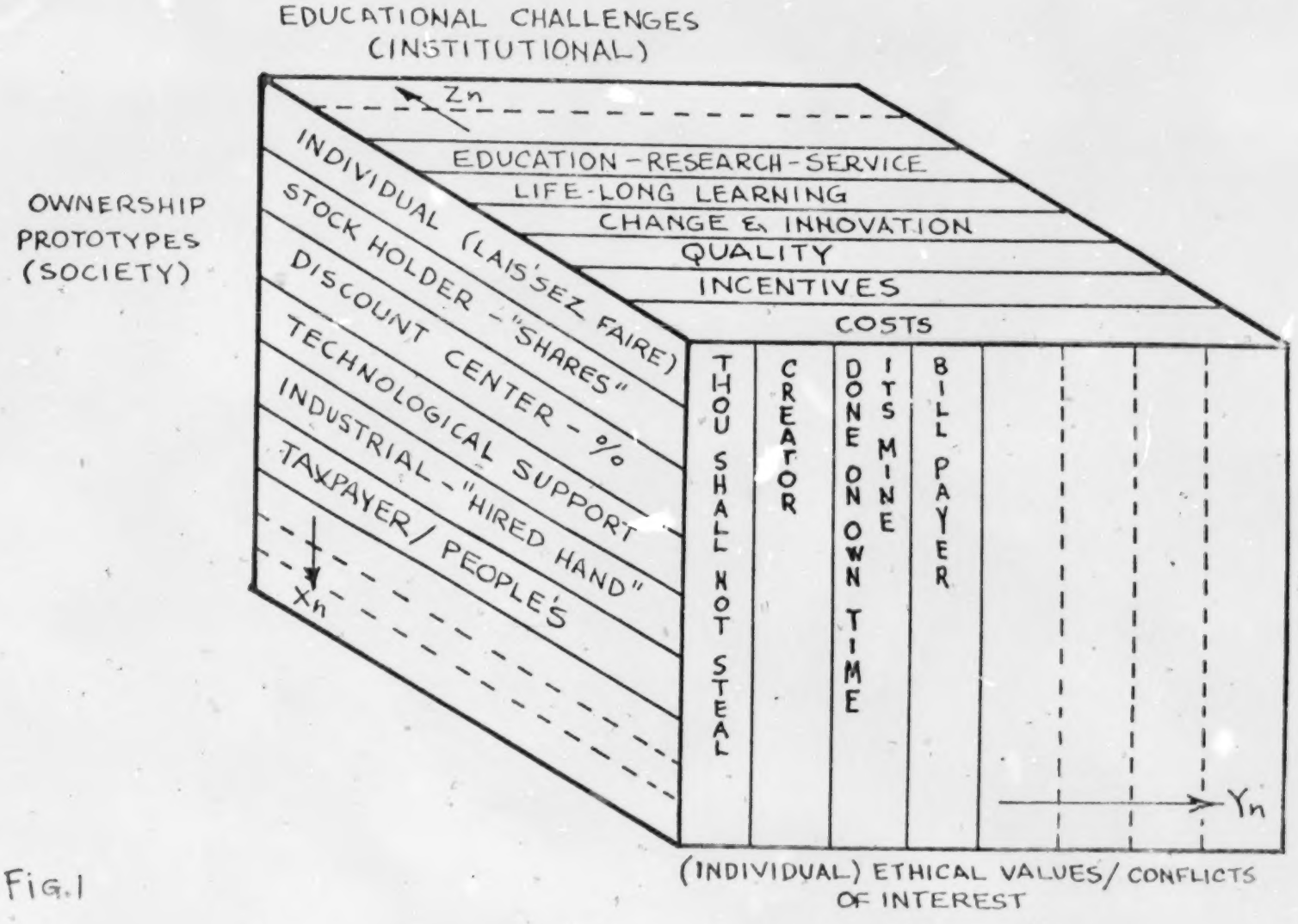

Fig. 1

APPENDIX: INTELLECTUAL PROPERTY OWNERSHIP POLICY DEVELOPMENT

A. Articles:

1. Audiovisual Instruction, AECT,
   1201 Sixteenth St., N.W.
   Washington, D.C. 20036
   one page per monthly issue devoted to copyright concerns.

2. College Personnel Rights and Responsibilities in College-Supported Inventions and Materials. 1974
   William Rainey Harper College
   Roselle & Algonquin Roads
   Palatine, Illinois 60067
   (Available from WRHC Bookstore, $1.00 single copy)

3. Commitment to Excellence, Davis, Abedor, Witt,
   Michigan State University
   East Lansing, Michigan, 1976, 189 p.p. (contains M.S.U's 1973 "ownership policy in its Appendix C).

4. Copyrights at Colleges and Universities.
   National Association of College and University Business Offices, Committee on Governmental Relations, 1972 - Washington, D.C.

5. "Copyright and Ownership of College-Developed Materials" in New Directions for Community Colleges
   Jossey-Bass, San Francisco, Spring 1975, Number 9

B. Some Institutions with representative Ownership Policies:

   University of Minnesota, Minneapolis
   Michigan State University, East Lansing
   Community College District of St. Louis
   Harper College, Palatine, Illinois
   Johnson County Community College, Overland Park, Kansas
   El Paso Community College, Texas
   Broward County ITV Center, Ft. Lauderdale, Florida